



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-&D- CORP.

DATE: MAY 27, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of digital printing services, seeks to permanently employ the Beneficiary as a business development manager. It seeks classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on January 27, 2014. The Director concluded that the record did not establish the Beneficiary's qualifying experience for the offered position or the requested classification. On July 25, 2014, we dismissed the Petitioner's appeal, affirming the Director's decision.

In its first motion to reopen, the Petitioner established the Beneficiary's possession of the qualifying experience for the offered position and the requested classification. However, we denied that motion on June 5, 2015 and another motion to reopen on February 9, 2016 because the record did not establish the Petitioner's ability to pay the proffered wage.

The matter is now before us on the Petitioner's third motion to reopen.¹ The Petitioner submits additional evidence in support of its ability to pay the proffered wage. We will deny the motion to reopen.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

¹ A petitioner must file a motion to reopen within 33 days of the date of a decision served by mail. *See* 8 C.F.R. § 103.5(a)(1) (requiring a motion to be filed within 30 days of a decision); *see also* 8 C.F.R. § 103.8(b) (adding 3 days to a filing deadline when a decision is served by mail). U.S. Citizenship and Immigration Services (USCIS) did not receive the instant motion until March 16, 2016, or 36 days after our most recent decision of February 9, 2016. However, we will accept the untimely filing pursuant to 8 C.F.R. § 103.5(a)(1), which authorizes us to excuse an untimely motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner."

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Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The labor certification states the proffered wage of the offered position of business development manager as \$156,998 per year. The petition's priority date is January 8, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

In determining a petitioner's ability to pay, we examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage, we examine whether it generated sufficient annual amounts of net income and net current assets to pay the difference between the proffered wage and any wages paid. If a petitioner's amounts of net income and net current assets are insufficient, we may also consider other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

The record contains copies of the Petitioner's federal income tax returns for 2013 and 2014. On motion, the Petitioner submits copies of financial statements for 2015 compiled by an accounting firm and a list of projects for 2016 with estimates of expected revenues. In a March 3, 2016, letter, the Petitioner's president stated that the company had not yet filed its federal income tax return for 2015. He stated that the return will be filed with the information included in the financial statements.

Pursuant to 8 C.F.R. § 204.5(g)(2), the financial statements submitted on motion were not audited. The Petitioner also did not submit a copy of its 2015 federal income tax return or an annual report in compliance with the regulation. Because the Petitioner did not submit required evidence of its ability to pay the proffered wage in 2015, we will consider its ability to pay only through 2014.

As indicated in our February 9, 2016, decision, neither the Petitioner's net income (-\$134,074) nor its net current assets (-\$347,766) in 2014 were sufficient to pay the difference between the annual proffered wage and the wages paid to the Beneficiary (\$107,332) that year. The materials submitted by the Petitioner on motion do not cure this deficiency.

Thus, based on examinations of the wages paid by the Petitioner to the Beneficiary, its net income, and its net current assets, the record on motion does not establish its continuing ability to pay the proffered wage from the petition's priority date onward.

² Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

(b)(6)

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The materials submitted by the Petitioner on motion also do not change our analysis under *Sonegawa*. Unlike the petitioner in *Sonegawa*, the instant record does not indicate that the Petitioner incurred uncharacteristic business expenses or losses, or possesses an outstanding reputation in its industry.

In addition, online government records indicate an outstanding judgment lien against the Petitioner in the amount of \$89,693.30. See [REDACTED] at [REDACTED] [REDACTED] (accessed [REDACTED] 2016). Thus, the record does not establish the Petitioner's ability to pay the proffered wage pursuant to *Sonegawa*.

After careful consideration, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm our prior decision and deny the motion.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The motion to reopen is denied.

Cite as *Matter of D-&D- Corp.*, ID# 18052 (AAO May 27, 2016)